



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA-R04-OAR-2011-0316; FRL-9771-1]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Alabama; Redesignation of the Birmingham 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a request submitted on May 2, 2011, from the State of Alabama, through the Alabama Department of Environmental Management (ADEM), Air Division, to redesignate the Birmingham fine particulate matter (PM_{2.5}) nonattainment area (hereafter referred to as the “Birmingham Area” or “Area”) to attainment for the 1997 Annual PM_{2.5} national ambient air quality standards (NAAQS). The Birmingham 1997 Annual PM_{2.5} nonattainment area is comprised of Jefferson and Shelby Counties in their entireties and a portion of Walker County. EPA’s approval of the redesignation request is based on the determination that the State of Alabama has met the criteria for redesignation to attainment set forth in the Clean Air Act (CAA or Act), including the determination that the Birmingham Area has attained the 1997 Annual PM_{2.5} NAAQS. Additionally, EPA is approving a revision to the Alabama state implementation plan (SIP) to include the 1997 Annual PM_{2.5} maintenance plan for the Birmingham Area that contains the new 2024 motor vehicle emission budgets (MVEBs) for nitrogen oxides (NO_x) and PM_{2.5}. This action also approves the 2009 emissions inventory submitted with the maintenance plan.

EFFECTIVE DATE: This rule will be effective on [insert 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2011-0316. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Joel Huey, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Joel Huey may be reached by phone at (404) 562-9104 or via electronic mail at huey.joel@epa.gov.

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I. What is the Background for the Actions?

As stated in our proposed approval notice published on November 10, 2011 (76 FR 70078), this redesignation action addresses the Birmingham Area's status solely with respect to the 1997 Annual PM_{2.5} NAAQS, for which designations were finalized on January 5, 2005 (70 FR 944) and April 14, 2005 (70 FR 19844). On May 2, 2011, the State of Alabama, through ADEM, submitted a request to redesignate the Birmingham Area to attainment for the 1997 Annual PM_{2.5} NAAQS and for EPA approval of the Alabama SIP revisions containing a maintenance plan for the Area. In the November 10, 2011, notice, EPA proposed to take the following three separate but related actions, some of which involve multiple elements: (1) to redesignate the Birmingham Area to attainment for the 1997 Annual PM_{2.5} NAAQS, provided EPA approves the emissions inventory submitted with the maintenance plan; (2) to approve into the Alabama SIP, under section 175A of the CAA, Alabama's 1997 Annual PM_{2.5} NAAQS maintenance plan, including the associated MVEBs; and (3) to approve, under CAA section

172(c)(3), the emissions inventory submitted with the maintenance plan. No comments were received on the proposed action. EPA is now taking final action on the three actions identified above. Additional background for today's action, and other details regarding the proposed redesignation, is set forth in EPA's November 10, 2011, proposal and is summarized below. The following information also: (1) affirms that the most recent available ambient monitoring data continue to support this redesignation action, (2) summarizes the NO_x and PM_{2.5} MVEBs for the year 2024 for the Birmingham Area, and (3) provides additional information on events that have occurred since the November 10, 2011, proposal.

With regard to the data, EPA has reviewed the most recent ambient monitoring data, which indicate that the Birmingham Area continues to attain the 1997 Annual PM_{2.5} NAAQS beyond the 3-year attainment period of 2008-2010, which was provided with Alabama's May 2, 2011, submittal and request for redesignation. As stated in EPA's November 10, 2011, proposal notice, the 3-year design value of 13.7 µg/m³ for 2008-2010 meets the NAAQS of 15.0 µg/m³. Quality assured and certified data now in EPA's Air Quality System (AQS) for 2011 provide a 3-year design value of 12.9 µg/m³ for 2009-2011. Furthermore, preliminary monitoring data for 2012 indicate that the Area is continuing to attain the 1997 Annual PM_{2.5} NAAQS. The 2012 preliminary data are available in AQS although are not yet quality assured and certified.

The MVEBs, specified in tons per year (tpy), included in the maintenance plan are as shown in Table 1 below. In the November 10, 2011, proposed action, EPA noted that the period for public comment on the adequacy of these MVEBs (as contained in Alabama's submittal) began on March 24, 2011, and closed on April 25, 2011. No comments were received during the public comment period. Through this final action, EPA is finding the 2024 NO_x and PM_{2.5}

MVEBs adequate for transportation conformity purposes and finalizing the approval of the budgets.

Table 1. Birmingham Area PM_{2.5} NO_x MVEBs (tpy)

	PM_{2.5}	NO_x
2024 On-road Mobile Emissions	335.70	8,738.39
Safety Margin Allocated to MVEBs	106.37	7,243.11
2024 Conformity MVEBs	442.07	15,981.50

In the November 10, 2011, proposed redesignation of the Birmingham Area, EPA proposed to determine that the emission reduction requirements that contributed to attainment of the 1997 Annual PM_{2.5} standard in the nonattainment area could be considered permanent and enforceable. *See* 76 FR at 70092, 70097-70099. At the time of proposal, EPA noted that the requirements of the Clean Air Interstate Rule (CAIR),¹ which had been in place since 2005, were to be replaced, starting in 2012, by the requirements in the then recently promulgated Cross-State Air Pollution Rule (CSAPR), 76 FR 48208 (August 8, 2011). CSAPR included regulatory

¹ On May 12, 2005, EPA published CAIR, which requires significant reductions in emissions of sulfur dioxide (SO₂) and NO_x from electric generating units to limit the interstate transport of these pollutants and the ozone and fine particulate matter they form in the atmosphere. *See* 70 FR 25162. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR, *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

changes to sunset (i.e., discontinue) the CAIR requirements for control periods in 2012 and beyond. *See* 76 FR at 48322. Although Alabama's redesignation request and maintenance plan included reductions associated with CAIR, EPA proposed to approve the request based in part on the fact that CSAPR achieved similar or greater reductions in the relevant areas in 2012 and beyond. *See* 76 FR at 70092, 70097-70099. Because CSAPR requirements were expected to replace the CAIR requirements starting in 2012, EPA considered the impact of CSAPR related reductions on the Birmingham Area. On this basis, EPA proposed to determine that, pursuant to CAA section 107(d)(3)(E)(iii), the pollutant transport part of the reductions that led to attainment in the Birmingham Area could be considered permanent and enforceable. *See* 76 FR at 70079, 70084-70086.

On December 30, 2011, shortly after EPA's proposed approval of the Birmingham redesignation, the D.C. Circuit issued an order addressing the status of CSAPR and CAIR in response to motions filed by numerous parties seeking a stay of CSAPR pending judicial review. In that order, the court stayed CSAPR pending resolution of the petitions for review of that rule in *EME Homer City Generation, L.P. v. EPA* (No. 11-1302 and consolidated cases), also referred to as *EME Homer City*. The court also indicated that EPA was expected to continue to administer CAIR in the interim until judicial review of CSAPR was completed. Subsequently, on August 21, 2012, the D.C. Circuit issued a decision in *EME Homer City* to vacate and remand CSAPR and to keep CAIR in place. Specifically, the court ordered EPA to continue administering CAIR pending the promulgation of a valid replacement. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 38 (D.C. Cir. 2012). The D.C. Circuit has not yet issued the final mandate in *EME Homer City* as EPA (as well as several intervenors) petitioned for rehearing *en banc*, asking the full court to review the decision. While rehearing proceedings are

pending, EPA intends to act in accordance with the panel opinion in the *EME Homer City* opinion.

Subsequent to the *EME Homer City* opinion, EPA published several proposals to redesignate both particulate matter and ozone nonattainment areas to attainment. These proposals explained the legal status of CAIR and CSAPR, and provided a basis on which EPA would consider emissions reductions associated with CAIR to be permanent and enforceable for redesignation purposes, pursuant to CAA section 107(d)(3)(D)(iii). In those actions, EPA explained that in light of the August 21, 2012, order by the D.C. Circuit, CAIR remains in place and enforceable until substituted by a “valid” replacement rule. *See, e.g.*, 77 FR 69409 (November 19, 2012); 77 FR 68087 (November 15, 2012).

Alabama’s May 2, 2011, SIP submittal supporting its redesignation request includes CAIR as a control measure, which became state-effective on April 3, 2007, and was approved by EPA on October 1, 2007, for the purpose of reducing SO₂ and NO_x emissions. *See* 72 FR 55659. Due to the legal status of CSAPR at the time that EPA proposed approval of Alabama’s May 2, 2011, redesignation submittal, EPA was able to rely on CSAPR related reductions. EPA also recognized that the monitoring data used to demonstrate the Birmingham Area’s attainment of the 1997 Annual PM_{2.5} NAAQS included reductions associated with CAIR. Due to the uncertainty regarding the legal status of CAIR when Alabama provided its submittal on May 2, 2011, the State’s analysis assumed that no additional reductions in SO₂ or NO_x emissions from utilities would occur above and beyond those achieved through 2012 as a result of CAIR. To the extent that the Alabama submittal relies on CAIR reductions that occurred through 2012, the recent directive from the D.C. Circuit in *EME Homer City* ensures that the reductions associated

with CAIR will be permanent and enforceable for the necessary time period for purposes of CAA section 107(d)(3)(E)(iii). EPA has been ordered by the court to develop a new rule, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. CAIR thus cannot be replaced until EPA has promulgated a final rule through a notice-and-comment rulemaking process; states have had an opportunity to draft and submit SIPs; EPA has reviewed the SIPs to determine if they can be approved; and EPA has taken action on the SIPs, including promulgating a Federal Implementation Plan, if appropriate. The court's clear instruction to EPA is that it must continue to administer CAIR until a "valid replacement" exists, and thus CAIR reductions may be relied upon until the necessary actions are taken by EPA and states to administer CAIR's replacement. Furthermore, the court's instruction provides an additional backstop; by definition, any rule that replaces CAIR and meets the court's direction would require upwind states to have SIPs that eliminate significant contributions to downwind nonattainment and prevent interference with maintenance in downwind areas.

Further, in deciding to vacate CSAPR and to require EPA to continue administering CAIR, the D.C. Circuit emphasized that the consequences of vacating CAIR "might be more severe now in light of the reliance interests accumulated over the intervening four years." *EME Homer City*, 696 F.3d at 38. The accumulated reliance interests include the interests of states who reasonably assumed they could rely on reductions associated with CAIR, which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the court sought to avoid by ordering EPA to continue

administering CAIR. For these reasons also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable for purposes such as redesignation. Following promulgation of the replacement rule, EPA will review SIPs as appropriate to identify whether there are any issues that need to be addressed.

In light of these unique circumstances and for the reasons explained above, EPA is approving the redesignation request and the related SIP revision for Jefferson and Shelby Counties in their entireties and a portion of Walker County in Alabama, including Alabama's plan for maintaining attainment of the 1997 Annual PM_{2.5} NAAQS in the Birmingham Area. EPA continues to implement CAIR in accordance with current direction from the court, and thus CAIR is in place and enforceable, and will remain so, until substituted by a valid replacement rule. Alabama's SIP revision lists CAIR as a control measure, which became state-effective on April 3, 2007, and was approved by EPA on October 1, 2007, for the purpose of reducing SO₂ and NO_x emissions. The monitoring data used to demonstrate the Area's attainment of the 1997 Annual PM_{2.5} NAAQS by the April 2010 attainment deadline was impacted by CAIR.

II. What are the Actions EPA is Taking?

In today's rulemaking, EPA is approving: (1) a change to the legal designation of the Birmingham Area from nonattainment to attainment for the 1997 Annual PM_{2.5} NAAQS; (2) under CAA section 175A, Alabama's 1997 Annual PM_{2.5} NAAQS maintenance plan, including the associated MVEBs; and (3) under CAA section 172(c)(3), the emissions inventory submitted with the maintenance plan for the Area. The maintenance plan is designed to demonstrate that

the Birmingham Area will continue to attain the 1997 Annual PM_{2.5} NAAQS through 2024. EPA's approval of the redesignation request is based on EPA's determination that the Birmingham Area meets the criteria for redesignation set forth in CAA, sections 107(d)(3)(E) and 175A, including EPA's determination that the Birmingham Area has attained the 1997 Annual PM_{2.5} NAAQS. EPA's analyses of Alabama's redesignation request, emissions inventory, and maintenance plan are described in detail in the November 10, 2011, proposed rule (76 FR 70078).

Consistent with the CAA, the maintenance plan that EPA is approving also includes 2024 NO_x and PM_{2.5} MVEBs for the Birmingham Area. In this action, EPA is approving these NO_x and PM_{2.5} MVEBs for the Birmingham Area for the purposes of transportation conformity. For required regional emissions analysis years that involve 2024 or beyond, the applicable budgets will be the new 2024 NO_x and PM_{2.5} MVEBs.

III. Why is EPA Taking These Actions?

EPA has determined that the Birmingham Area has attained the 1997 Annual PM_{2.5} NAAQS and has also determined that all other criteria for the redesignation of the Birmingham Area from nonattainment to attainment of the 1997 Annual PM_{2.5} NAAQS have been met. *See* CAA section 107(d)(3)(E). One of those requirements is that the Birmingham Area has an approved plan demonstrating maintenance of the 1997 Annual PM_{2.5} NAAQS. EPA is also taking final action to approve the maintenance plan for the Birmingham Area as meeting the requirements of sections 175A and 107(d)(3)(E) of the CAA. In addition, EPA is approving the new NO_x and PM_{2.5} MVEBs for the year 2024 for the Birmingham Area as contained in Alabama's maintenance plan because these MVEBs are consistent with maintenance of the 1997

Annual PM_{2.5} standard in the Birmingham Area. Finally, EPA is approving the emissions inventory as meeting the requirements of section 172(c)(3) of the CAA. The detailed rationale for EPA's determinations and actions are set forth in the proposed rulemaking and in other discussion in this final rulemaking.

IV. What are the Effects of These Actions?

Approval of the redesignation request changes the legal designation of the Birmingham Area from nonattainment to attainment for the 1997 Annual PM_{2.5} NAAQS. EPA is modifying the regulatory table in 40 CFR 81.301 to reflect a designation of attainment for these full and partial counties. EPA is also approving, as a revision to the Alabama SIP, Alabama's plan for maintaining the 1997 Annual PM_{2.5} NAAQS in the Birmingham Area through 2024. The maintenance plan includes contingency measures to remedy possible future violations of the 1997 Annual PM_{2.5} NAAQS and establishes NO_x and PM_{2.5} MVEBs for the year 2024 for the Birmingham Area. Additionally, this action approves the emissions inventory for the Birmingham Area pursuant to section 172(c)(3) of the CAA.

V. Final Action

EPA is taking final action to approve three separate but related actions, some of which involve multiple elements: (1) the redesignation of the Birmingham Area to attainment for the 1997 Annual PM_{2.5} NAAQS; (2) under CAA section 175A, Alabama's 1997 Annual PM_{2.5} NAAQS maintenance plan, including the associated MVEBs; and (3) under CAA section 172(c)(3), the emissions inventory submitted with the maintenance plan for the Area. The 1997

Annual PM_{2.5} maintenance plan for the Birmingham Area includes the new 2024 NO_x and PM_{2.5} MVEBs of 15,981.50 tpy and 442.07 tpy, respectively. Within 24 months from the effective date of EPA's adequacy determination, the transportation partners will need to demonstrate conformity to the new NO_x and PM_{2.5} MVEBs pursuant to 40 CFR 93.104(e).²

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For these reasons, these actions:

- are not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

² The adequacy finding becomes effective upon the date of publication of this notice in the Federal Register. 40 CFR 93.118(f)(2)(iii).

- are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- are not significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this final rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, and Particulate matter.

40 CFR Part 81

Environmental protection, Air pollution control, National parks.

Dated: January 9, 2013

Gwendolyn Keyes Fleming
Regional Administrator,
Region 4.

40 CFR parts 52 and 81 are amended as follows:

PART 52-APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart B - Alabama

2. Section 52.50(e) is amended by adding a new entry for “1997 Annual PM_{2.5} Maintenance Plan for the Birmingham Alabama Area” at the end of the table to read as follows:

§ 52.50 Identification of plan.

* * * * *

(e) * * *

EPA-Approved Alabama Non-Regulatory Provisions

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanation
**	**	**	*	
1997 Annual PM _{2.5} Maintenance Plan for the Birmingham Area	Birmingham PM _{2.5} Nonattainment Area	5/2/11	[Insert date of publication in <u>Federal Register</u>] [Insert citation of publication]	

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. In § 81.301, the table entitled “Alabama-PM_{2.5} (Annual NAAQS)” is amended under “Birmingham, AL” by revising the entry for “Jefferson County, Shelby County, Walker County (part)” to read as follows:

§ 81.301 Alabama.

* * * * *

Alabama - PM_{2.5} (Annual NAAQS)

Designated area	Designation ^a	
	Date ¹	Type
Birmingham, AL:		
Jefferson County	This action is effective [Insert date of publication in the Federal Register]	Attainment
Shelby County	This action is effective [Insert date of publication in the Federal Register]	Attainment
Walker County (part) The area described by U.S. Census 2000 block group identifiers 01-127-0214-5, 01-127-0215-4, and 01-127-0216-2	This action is effective [Insert date of publication in the Federal Register]	Attainment
* * *	* * *	*

^a Includes Indian Country located in each county or area, except as otherwise specified.

¹ This date is 90 days after January 5, 2005, unless otherwise noted.

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[FR Doc. 2013-00954 Filed 01/18/2013 at 8:45 am; Publication Date: 01/22/2013]